

## Major Contracting Reform Could Hurt Competition, Small Biz

By Dietrich Knauth

*Law360, New York (July 10, 2012, 6:24 PM ET)* -- A Pentagon advisory board has recommended a complete overhaul of the U.S. Department of Defense's byzantine procurement regulations, kickstarting a debate that could cause the government to consider sacrificing policy goals like maximizing competition or boosting small businesses in the name of greater efficiency.

A Defense Business Board panel, which included retired leaders from the military and defense industry, including former Pentagon comptroller and Booz Allen Hamilton executive Dov Zakheim, reviewed more than 300 past studies on the DOD's acquisition practices, including reports from the U.S. Government Accountability Office, Congressional Research Service, Congressional Budget Office and many think tanks and commissions.

After more than nine months of review and 221 interviews with past and present senior officials, the panel's first piece of advice in a June report was simple: Start over.

"Zero base the entire system, including all directives and regulations," the report recommended. "The burden of proof should be on those who argue to retain something versus those who argue to remove it."

Despite multiple efforts by Congress and the DOD to improve the system, the acquisition system is hampered by a "stovepiped" structure that involves three separate processes for defining requirements, conducting acquisitions and managing budgets, adding bureaucratic complexity to any acquisition, according to the report.

The Pentagon's acquisition system "continues to take longer, cost more, and deliver fewer quantities and capabilities than originally planned," eating up a bigger portion of defense budget at a time when there is increasing pressure on military spending, the report said. The GAO reported \$135 billion in annual cost growth for major weapons systems, compared to the DOD's base budget of \$530 billion in 2012.

Acquisition experts and attorneys generally agreed that the Pentagon's acquisition system is inefficient and bogged down in bureaucracy — but many cautioned that those inefficiencies are driven by well-meaning but competing policy goals, such as full and fair contract competitions, affirmative action policies, preferences for small businesses and a desire for auditability and transparency.

A simplified acquisition process will involve serious tradeoffs and choices among those goals, they said.

"Do we want a fast, efficient acquisition system? Then something's got to go," said Bill Greenwalt, vice president of acquisition policy for the Aerospace Industries Association. "Every initiative that is laid into the system will go into government overhead and contractor overhead that will increase expense — are

those transparency initiatives worth the cost?”

Greenwalt is among many commentators who agree that the system needs a dramatic reform rather than added regulations. Numerous reforms have been implemented incrementally with the goal of improving contracting, Greenwalt said, but he likened those efforts to a ship picking up barnacles as it travels.

“There are so many barnacles on this acquisition ship, and it is time to scrape them all off and start over,” Greenwalt said. “The question is, after you scrape them all off, which ones do you put back on and are they the right ones?”

Clearing away some of the obstacles to more efficient contracting will require a delicate balancing of interlocking policy goals and a serious look at scrapping or de-emphasizing some of those goals, according to Jeff Houle, chairman of the defense and government services transactional practice at DLA Piper.

The fundamental focus on competition in contracting in the Federal Acquisition Regulation is itself somewhat at odds with a drive towards greater efficiency, and any reform would have to strike a careful balance between the two, he said.

"There may be room for improvements, but any modifications to the process to yield greater efficiency will have to be weighed against the policy goals of creating competition," Houle said. "One would have to take a holistic approach because of the interlocking goals of the federal acquisition regulations."

And while some of the complexity in the acquisition system comes from efforts to protect small businesses and ensure they have a fair shot at contracts, the thicket of regulations surrounding acquisitions can actually put small businesses at even more of a disadvantage, experts said.

Contracting attorneys and professionals have become more and more specialized in response to the regulatory complexity surrounding contracting, and the need to hire multiple attorneys for a procurement can harm the same small businesses that many of the rules seek to protect, according to David Bodenheimer, a government contracts attorney at Crowell & Moring LLP and an expert in cybersecurity law.

“There's no question that this has become complex beyond the ability even of experts to navigate,” Bodenheimer said. “Small businesses are at an extreme disadvantage under the current acquisition rules in terms of day-to-day compliance, because they can't afford a big legal department.”

The report praised recent acquisition reform efforts by Defense secretaries Robert Gates and Leon Panetta, including rapid response acquisitions designed to provide logistical support, armor and Mine Resistant Ambush Protected vehicles to troops fighting in Iraq and Afghanistan and the DOD's Better Buying Power Initiative to improve outcomes and instill cost controls.

But those recent steps aren't enough, according to August Cole, an adjunct fellow at the American Security Project, who pointed out that the rapid MRAP acquisitions only cut through the DOD's red tape because of the personal involvement of then-Secretary Gates.

“That's a pretty big indication that the system doesn't work,” Cole said. “Warfare in the 21st century is a very fast-moving activity and it is clear already that the defense acquisition community is not up to keeping pace.”

Real change at the Pentagon will be difficult to achieve, but the report is a good starting point, showing sensible policy recommendations and a willingness to think big, Cole said.

“There are a lot of good ideas in this report about how to fix the acquisition system, but perhaps the best is taking a wholesale look at starting over,” Cole said. “That’s actually quite significant and even revolutionary.”

Bodenheimer and Greenwalt said the DOD should learn from the lessons of the contracting reform in the mid-1990s, which introduced the Federal Acquisition Streamlining Act and new rules that allowed the DOD to buy commercially available items with less documentation.

“Essentially, legislation increased the productivity of the acquisition workforce by allowing them to focus on awarding contracts instead of moving paper,” Bodenheimer said. “Unfortunately, Congress and the agencies then began to add back the statutory and regulatory red tape, and also the more extreme oversight that burdens acquisitions.”

Greenwalt said the DOD is returning to where it was in the 1980s, when its policies became so unfriendly to business that technology leaders like Motorola simply refused to sell to the military. That could hurt the military’s renewed focus on advanced computing and cybersecurity if successful technology companies balk at compliance with rules that limit contractor executive pay, to name one example, he added.

“In the last 10 or 15 years many of these same issues have crept back into the system,” Greenwalt said. “It’s a real dilemma and something I know the [DOD] would like to break through, but the trends have not been going in the right direction.”

Financial pressures on federal budgets, particularly in military spending, have the potential to hinder or spur reforms, experts said. While the pressure could force Congress to seriously consider a real overhaul, lower budgets also could hurt reform efforts by adding new oversight regulations or sparking a short-sighted race to save money by emphasizing lowest-dollar contracts or asking more of overmatched contracting officials, Greenwalt said.

Lower budgets and poor staffing could make an already bureaucratic system almost unworkable, and budget cuts could be particularly harmful if they fall on an acquisition workforce that has already “atrophied,” according to the report.

There are signs that austerity measures could stand in the way of investments in a skilled acquisition workforce — the U.S. House of Representatives already has reduced funding for acquisition training that President Barack Obama requested in his 2013 defense budget.

When the DOD has asked its acquisition staff to “do more with less” the results have generally not been pretty, Bodenheimer said, using the example of the Navy A12 aircraft, a multibillion dollar program that was ultimately canceled after coming in far behind schedule, and far overbudget.

“Many times, the [DOD] has tried to buy cheap and ended up getting a more expensive product, or nothing,” Bodenheimer said.

While the potential dangers of shortsighted cost-cutting are clear, Cole, for one, hopes that budget pressures could lead to positive change by shaking up a status quo that is no longer acceptable.

“An austere environment may be just what industry and the government need to re-examine the fundamental tenets of how they do business,” Cole said. “This is a moment when heretical thinking, if you will, is appropriate.”